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In the Supreme Court of the United States

OCTOBER TERM, 1978

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

GENEVIEVE O. RASMUSSEN, ET AL.

GEO CONTROL, INCORPORATED and NEW HAMPSHIRE INSURANCE COMPANY, PETITIONERS

v.

GENEVIEVE O. RASMUSSEN, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a)[1] is reported at 567 F.2d 1385. The Benefits Review Board's opinion (Pet. App. 15a-25a) is reported at 1 BRBS 378. The decision of the administrative law judge (Pet. App. 27a-74a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 20, 1978. The petition on behalf of the Director of the Office of Workers' Compensation Programs, United States Department of Labor, was filed on April 14, 1978; the petition on behalf of Geo Control, Inc., and New Hampshire Insurance Company was filed on April 19, 1978. Both petitions were granted, and the cases were consolidated for review, on June 12, 1978. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the weekly rate of death benefits under the amended Longshoremen's and Harbor Workers' Compensation Act is subject to the maximum limitations of Section 6(b)(1) of the Act.

STATUTES INVOLVED

1. Before its amendment in 1972, the Longshoremen's and Harbor Workers' Compensation Act provided in relevant part:

[1] "Pet. App." refers to the appendix to the petition in No. 77-1465.

Section 6(b), 44 Stat. 1426, as amended, 33 U.S.C. (1970 ed.) 906(b):

> Compensation for disability shall not exceed $70 per week and compensation for total disability shall not be less than $18 per week: *Provided, however*, That, if the employee's average weekly wages, as computed under section 10 of this title, are less than $18 per week he shall receive as compensation for total disability his average weekly wages.

Section 9, 44 Stat. 1429, as amended, 33 U.S.C. (1970 ed.) 909:

> If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:
>
> * * * * *
>
> (b) If there be a surviving wife or dependent husband and no child of the deceased, to such surviving wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 15 per centum of such wages for each child; in case of the death or remarriage of such surviving wife or dependent husband, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 35 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 35

per centum of such wages increased by 15 per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66⅔ per centum of such wages. * * *

* * * * *

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 nor less than $27 but the total weekly compensation shall not exceed the weekly wages of the deceased.

* * * * *

2. As amended by the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1251, the Act now provides in relevant part:

Section 6(b), (d), 33 U.S.C. (Supp. V) 906(b), (d):

(b)(1) * * * [C]ompensation for disability shall not exceed the following percentages of the applicable national average weekly wage as determined by the Secretary under paragraph (3):

(A) 125 per centum or $167, whichever is greater, during the period ending September 30, 1973.

(B) 150 per centum during the period beginning October 1, 1973, and ending September 30, 1974.

(C) 175 per centum during the period beginning October 1, 1974, and ending September 30, 1975.

(D) 200 per centum beginning October 1, 1975.

(2) Compensation for total disability shall not be less than 50 per centum of the applicable national average weekly wage determined by the Secretary under paragraph (3), except that if the employee's average weekly wages as computed under section 10 of this title are less than 50 per centum of such national average weekly wage, he shall receive his average weekly wages as compensation for total disability.

(3) As soon as practicable after June 30 of each year, and in any event prior to October 1 of such year, the Secretary shall determine the national average weekly wage for the three consecutive calendar quarters ending June 30. Such determination shall be the applicable national average weekly wage for the period beginning with October 1 of that year and ending with September 30 of the next year. The initial determination under this paragraph shall be made as soon as practicable after the enactment of this subsection.

* * * * *

(d) Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

Section 9, 33 U.S.C. (Supp. V) 909:

If the injury causes death, or if the employee who sustains permanent total disability due to the injury thereafter dies from causes other than the injury, the compensation shall be known as a death benefit and shall be payable in the

amount and to or for the benefit of the persons following:

* * * * *

(b) If there be a widow or widower and no child of the deceased, to such widow or widower 50 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood, with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 16⅔ per centum of such wages for each such child; in the case of the death or remarriage of such widow or widower, if there be one surviving child of the deceased employee, such child shall have his compensation increased to 50 per centum of such wages, and if there be more than one surviving child of the deceased employee, to such children, in equal parts, 50 per centum of such wages increased by 16⅔ per centum of such wages for each child in excess of one: *Provided*, That the total amount payable shall in no case exceed 66⅔ per centum of such wages. * * *

* * * * *

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 6(b) but the total weekly benefits shall not exceed the average weekly wages of the deceased.

STATEMENT

Respondents are the widow and child of Dr. William C. Rasmussen, a hydrologist who was killed on

May 11, 1973, by a land mine explosion in the course of his work in Vietnam for Geo Control, Inc. His employment was within the coverage of the Defense Base Act, 55 Stat. 622, as amended, 42 U.S.C. 1651 *et seq.*, one of the several statutory extensions of the Longshoremen's and Harbor Workers' Compensation Act. When respondents claimed death benefits under the Longshoremen's Act, Geo Control and its workers' compensation insurer, New Hampshire Insurance Co., agreed that benefits were payable, but disputed the weekly rate claimed by the beneficiaries—two-thirds of Dr. Rasmussen's average weekly wages of $798, or $532 a week. The employer and insurer contended that the limitations of Section 6(b)(1) of the Longshoremen's Act, 33 U.S.C. (Supp. V) 906(b)(1)—initially $167 a week, and now $367.22 a week[2]—were applicable to death benefits in the same manner as to benefits for permanent total disability.

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[2] The national average weekly wages, maximum benefit levels, and percentage increases determined by the Secretary under Sections 6(b)(3), 6(b)(1), and 10(f), respectively, since the 1972 amendments have been:

Effective Date	National Average Weekly Wage	Section 6(b)(1) Maximum	Section 10(f) Adjustment
11/26/72	$131.80	$167.00	——
10/1/73	140.36	210.54	6.49%
10/1/74	149.14	261.00	6.26%
10/1/75	159.19	318.38	6.74%
10/1/76	171.27	342.54	7.59%
10/1/77	183.61	367.22	7.21%
10/1/78*	198.25	396.50	7.97%

* Based on preliminary figures.

The question of the applicability of the Section 6(b)(1) limitations to death benefits was initially litigated before the Deputy Commissioner for the Fifteenth Compensation District of the Department of Labor's Office of Workers' Compensation Programs (OWCP). That was the first occasion to develop an administrative construction of the amended provisions; it had not previously been suggested that the death benefits payable to the survivors of high-income workers were unlimited in weekly rate under the amended Longshoremen's Act. The OWCP adopted the position, and the deputy commissioner ruled, that Section 6(d) made the weekly-rate limitations of Section 6(b)(1) applicable to death benefits in the same special way as to benefits for permanent total disability: the rate computed under the Act's general provisions (ordinarily based on two-thirds of the employee's weekly earnings) is to be limited only by the maximum rate in effect at the time the benefits are payable, rather than continuing to be subject to the limitation in effect at the time of the injury or death (Pet. 7-8; Pet. App. 27a-74a).

The beneficiaries appealed to the Benefits Review Board, pursuant to Section 21(b)(3) of the Longshoremen's Act (33 U.S.C. (Supp. V) 921(b)(3)), but the Board did not reach the substantive question; it vacated the deputy commissioner's decision on the ground that the regulations implementing the 1972 amendment to Section 19(d) of the Act (33 U.S.C. (Supp. V) 919(d)) had deprived the deputy commissioner of authority to resolve any contested issue,

even if no evidentiary hearing was necessary.[3] *Rasmussen* v. *Geo Control, Inc.*, BRB No. 132-73, decided December 6, 1973.

The dispute then came before an administrative law judge, who rejected the OWCP's construction and sustained the survivors' position that the weekly rate of death benefits under the Longshoremen's Act is subject to no maximum limitation (Pet. App. 27a-74a).

The Director of the OWCP and the employer and insurer appealed to the Benefits Review Board, which affirmed the administrative law judge's decision (Pet. App. 15a-25a). The Board acknowledged the "apparent incongruity" of having a ceiling on the weekly benefits payable to a permanently totally disabled worker but no limitation on the rate of compensation payable to the surviving family should the worker die (*id.* at 18a). Nevertheless, following the administrative law judge's analysis of the legislative history of the 1972 amendments to the Longshoremen's Act benefits structure, the Board concluded that "elimination of the maximum benefit provision from Section 9(e) of the Act * * * was done consciously and intentionally" (*id.* at 22a), and "that failure to substitute a new maximum was * * * a deliberate action" (*id.* at 22a-23a). The Board agreed with the administrative law judge's construction of Section 6(d), limiting its effect on death benefits to the annual upgrading of payments at the *minimum* level established by amended Section 9(e) (*id.* at 23a).

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[3] See 20 C.F.R. 702.301 to 702.318 (1977).

The Director and the employer and insurer sought review by the court of appeals under Section 21(c) of the Act (33 U.S.C. (Supp. V) 921(c)). The court of appeals affirmed the Board's decision, generally following its reasoning (Pet. App. 1a-14a). The court found that Section 6(d) is no more than an ambiguous indication that the Section 6(b)(1) limitations apply to death benefits (*id.* at 7a-8a and n. 5), while Section 9(e) is an unambiguous indication, shown by its legislative history not to have been inadvertent, that death benefit rates are subject to no upper limits (*id.* at 8a-11a). The characterization of the effect of Section 6(d) in the congressional Committee Reports was found to be "overwhelmingly outweighed by the contrary purport of the legislative history as a whole" (*id.* at 8a n.5). The "premium on death" represented by the absence of a maximum weekly rate, the court found, "does appear to have its advocates" (*id.* at 11a-12a and n.8), and is reflected as well in the difference between the *minimum* limitations of Section 6(b)(2) and Section 9(e) (*id.* at 13a-14a and n. 9).

SUMMARY OF ARGUMENT

The court of appeals held that, despite the limitations applicable in cases of disability, when a covered worker dies there is no absolute ceiling on the weekly benefits payable to his dependents. The only limits recognized by the court are those fixed as a percentage of the wages of the deceased by Section 9 (*supra*, pp. 5-6). We submit, on the contrary, that Section 6

(d) (*supra*, p. 5) makes applicable to death cases, like all others (albeit with a slight difference as we explain in a moment), the absolute ceilings announced by Section 6(b)(1) (*supra*, p. 4)—now 200 per cent of the national average weekly wage.

We believe the court's result is at odds with the language of the statute, its legislative history and what may be assumed to have been the congressional intent to avoid disparate treatment.

First, the reasoning of the Board and of the court of appeals makes Section 6(d) of the Act meaningless. That provision refers to "determinations" and says that these "shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits." In the court's view, this means only that "the applicable national average weekly wage" spoken of in Section 9(e) (*supra*, p. 6)—and there made the minimum "base" wage used in calculating death benefits—shall be the current national average most recently determined by the Secretary of Labor under Section 6(b)(3) (*supra*, p. 5). But this is already made clear by Section 10(f) of the Act (33 U.S.C. (Supp. V) 910(f)) for all cases of permanent total disability and death. If Section 6(d) does no more than announce that the minimum benefits in such cases shall be governed by these annual computations, it is entirely superfluous.

In our submission, the true scope of Section 6(d) is made clear in the legislative history of the 1972 amendments, which the court misread. To be sure, Section 9(e) was deliberately written to eliminate a

limitation based on the amount of the employee's *actual* wages that would be considered. But the provision is wholly silent on our question: whether the ceiling imposed by Section 6(b)(1) on the *benefit rate* applies in death cases. That is resolved by the Committee Reports (S. Rep. No. 92-1125, 92d Cong., 2d Sess. 5 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 3 (1972)):

> To the extent that employees receiving compensation for total permanment [sic] disability or survivors receiving death benefits receive less than the compensation they would receive if there were no phase-in [to the ultimate new maximum weekly benefit rate of 200 per cent of the national average weekly wage], their compensation is to be increased as the ceiling moves to 200 percent.

This explains that, by virtue of Section 6(d), the ceilings apply in a special way to cases of permanent total disability and death. Unlike the compensation for lesser degrees of disability, the minimum rate of benefits for permanent total disability and death is not frozen: it is always to be the specified percentage of the workers' pre-injury wages, adjusted under Section 10(f), subject only to the Section 6(b)(1) limitation *currently* in effect—not that determined for the period during which the injury or death occurred.

Finally, the decision fails to suggest any rational basis for a congressional discrimination against the totally disabled in favor of the survivors of a deceased employee. All indications in the legislative history, as well as the structure of the Act, are that Congress intended to treat these two categories of claims alike.

ARGUMENT

THE WEEKLY RATE OF DEATH BENEFITS UNDER THE AMENDED LONGSHOREMEN'S ACT IS SUBJECT TO THE SAME MAXIMUM LIMITATIONS AS BENEFITS FOR PERMANENT TOTAL DISABILITY.

A. The Issue In Context

1. This case involves the total amount payable each week to the dependents of a deceased worker covered by the Longshoremen's Act. There is no dispute about how the benefit should be apportioned among the survivors, or how long any of them is entitled to receive a share. Nor are we concerned with *minimum* payments: because Dr. Rasmussen was earning relatively high wages, the provisions specifying minimum benefits do not come into play. The only issue is how the *maximum* weekly benefit is determined.

Before the 1972 amendments to the Act, the weekly rate of compensation in *all* cases, whether payable to an injured worker or to the dependents of a deceased worker, was subject to two ceilings, one relative, the other absolute. Except for very low paid workers, the first rule was that weekly benefits could not exceed a stated percentage of actual wages (usually two-thirds thereof). That remains essentially unchanged today. But there was also an absolute maximum, last fixed in 1961 at $70 per week. The 1972 amendments, at least for cases of disability, preserved the absolute ceiling on the amount of weekly benefits, albeit the limit is now fixed in terms of the national average weekly wage rather than a stated sum. The

question in this case is whether the amendments effectively removed any absolute maximum in death cases. We think not. The court of appeals disagreed.

2. Such is the controversy in broad outline. In order to understand the arguments, however, we must examine the statutory scheme more closely. Before the 1972 amendments, Section 6(b) of the Act (33 U.S.C. (1970 ed.) 906(b)) flatly provided in relevant part: "Compensation for disability shall not exceed $70 per week * * *." The corresponding provision for cases in which the covered worker died, Section 9(e) (33 U.S.C. (1970 ed.) 909(e)), stipulated: "In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $105 * * *." This effectively fixed the maximum aggregate weekly benefit payable to dependents at the same $70 figure since total payments to the survivors, then as now, could not exceed two-thirds of the worker's weekly wages.[4] See Section 9(b) (33 U.S.C. (1970 ed.) 909(b)). Indeed, the absolute ceiling was lower whenever the worker left fewer than four survivors.[5]

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[4] In the case of a worker earning less than $27 per week, his wages were deemed to be $27 and the benefit payable to his dependents might exceed two-thirds of his actual wages, albeit the benefit could in no event exceed 100 percent of his true wages. Section 9(e).

[5] Section 9(b) allocated 35 percent of the decedent's average wage to the surviving spouse (or the first surviving child) and 15 percent to each child (or additional child), subject to an aggregate maximum of 66 2/3 percent. Thus, applying the arbitrary assumed maximum wage of $105, a widow (or widower) alone could receive no more than $36.75; a widow and one child a total of $52.50; a widow and two children a total of $68.25. The maximum percentage of average wages, two-thirds, was not reached except when the deceased was survived by a dependent spouse and three or more children.

In sum, the weekly benefits in death cases were never greater than those that would have been payable to the worker himself if he had survived totally disabled, and were often less.[6] The court below concluded, however, that the 1972 amendments reversed this pattern.

3. The 1972 amendments deleted both the dollar ceilings on disability benefits in Section 6(b) and the dollar ceiling on wages that could be considered in fixing death benefits in Section 9(e). In Section 6(b), still expressly applicable only to "[c]ompensation for disability," Congress substituted an annually increasing maximum on weekly benefits, measured as a percentage of the national average wage. 33 U.S.C. (Supp. V) 906(b), as amended by Section 5(a) of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972, 86 Stat. 1252. But no new ceiling was inserted in Section 9(e), 33 U.S.C. (Supp. V) 909(e), as amended by Section 10(d) of the 1972 Act. Therein lies the rub.

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[6] This relationship between the specified maximum compensation (Section 6(b)) and the specified maximum considered wages in death cases (Section 9(e)) had always existed. Act of July 26, 1956, Sections 1, 4, 70 Stat. 654, 655 ($54 and $81, respectively); Act of June 24, 1948, Sections 1, 3, 62 Stat. 602 ($35 and $52.50, respectively); Act of March 4, 1927, Sections 6(b), 9(e), 44 Stat. 1426, 1430 ($25 and $37.50, respectively).

There are, however, three provisions in the 1972 amendments that relate death benefits to the national average weekly wage. One is the new definition in Section 9(e) of the *minimum* wage assumed for the purpose of calculating death benefits. Instead of $27, it is now provided that the deceased worker's weekly wages "shall be considered to have been not less than the applicable national average weekly wage as prescribed in section 6(b) * * *."

The next provision is a general one, Section 10(f), added by the 1972 amendments. It reads as follows:

> Effective October 1 of each year, the compensation or death benefits payable for permanent total disability or death arising out of injuries sustained after October 27, 1972, shall be increased by a percentage equal to the percentage (if any) by which the applicable national weekly wage for the period beginning on such October 1, as determined under section 6(b), exceeds the applicable national average weekly wage, as so determined, for the period beginning with the preceding October 1.

This provision makes clear that, in cases of permanent total disability and death, benefits are adjusted upward every year if the national average wage rises. Although Section 10(f) gives the increment to all beneficiaries in these categories of cases, including those unaffected by minimum or maximum, the incidental effect is partially to lift any ceiling and, to the same extent, to raise any floor, which is applicable to such benefits.

Finally, the 1972 amendments added subsection (d) to Section 6:

> Determinations under this subsection with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

Plainly, there was a slip of the legislative pen: everyone agrees that "this subsection" should read "this section," or "subsection (b) of this section"—the reference being to the determinations embodied in Section 6(b).[7] It is likewise common ground that Section 6(d), in the case of permanent total disability or death (unlike partial or temporary disability), at least announces one rule (already encompassed by Section 10(f)): that the minimum benefit is not frozen as of the date of the injury or death, but rises annually with the national average wage. Beyond that, however, there is no agreement as to the meaning of Section 6(d).

The court below, following the Board, held that the only "determinations" referred to in Section 6(d) are the annual calculations of the national average

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[7] The obvious reason for the slip is that new subsections (b), (c) and (d) of Section 6 were all set forth in subsection (a) of Section 5 of the amending Act of 1972, 86 Stat. 1252-1253. There are no "determinations" provided for in Section 6(d) itself. See *Director, Office of Workers' Compensation Programs* v. *O'Keefe*, 545 F.2d 337, 344 (C.A. 3); *Director, Office of Workers' Compensation Programs* v. *Boughman*, 545 F.2d 210, 215 (C.A. D.C.); Pet. App. 56a; cf. *id.* at 23a, 7a n. 5.

weekly wage made by the Secretary of Labor pursuant to paragraph (3) of Section 6(b). Hence, according to the court, the only "survivors" affected by Section 6(d) are those receiving the Section 9(e) minimum—*i.e.*, survivors of workers who were earning less than the national average wage; Section 6(d) would impose no ceiling on the survivors of those earning more. On the other hand, we, like the United States Courts of Appeals for the District of Columbia and Third Circuits,[8] read Section 6(d) as making applicable to both total permanent disability and death cases the ceilings announced in Section 6(b)(1)—today 200 per centum of the national average wage. In our view, that construction is compelled by the structure of the statute, its legislative history, and what may be assumed to have been the congressional intent to avoid disparate treatment.

B. The Intent Of Congress

Because the text of the statute is somewhat ambiguous, we turn first to the legislative history of the 1972 amendments.

1. The court below correctly noted that the genesis of the 1972 amendments is to be found in two proposals introduced in 1971. The first of these, represented by a pair of identical bills, S. 2318 and H.R. 12006, would have eliminated all ceilings on benefits (except two-thirds of the employee's wages) in both disability and death cases. S. 2318, 92d Cong., 1st

[8] *Director, Office of Workers' Compensation Programs* v. *O'Keefe, supra; Director, Office of Workers' Compensation Programs* v. *Boughman, supra.*

Sess., Sections 4(a), 10(b) (1971); H.R. 12006, 92d Cong., 1st Sess., Sections 4(a), 10(b) (1971). The other proposal, embodied in a second pair of identical bills, S. 525 and H.R. 3505, would have retained, although substantially increased, the fixed "dollar maximums" in both kinds of cases, and would have continued the pattern of a direct maximum on *compensation* in disability cases and an indirect ceiling on *wages to be considered* in death cases ($119 and $178.50, respectively). S. 525, 92d Cong., 1st Sess., Sections 4(a), 8(c) (1971); H.R. 3505, 92d Cong., 1st Sess., Sections 4(a), 8(c) (1971). Significantly, however, both proposals, despite their considerable differences, would have continued to treat deaths and disabilities in the same way: either both would remain subject to an absolute maximum, or neither would be subject to any maximum (other than two-thirds of the employee's actual wages).

Hearings were conducted on S. 2318 and S. 525 by a subcommittee of the Senate Committee, in May and June 1972,[9] and on H.R. 12006 and H.R. 3505 by a subcommittee of the House Committee in June and July.[10] Predictably, representatives of employee groups uniformly applauded the elimination of maximum benefit levels proposed by S. 2318 and H.R.

[9] Hearings on S. 2318, S. 525 and S. 1547 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 92d Cong., 2d Sess. (1972).

[10] Hearings on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023 before the Select Subcommittee on Labor of the House Committee on Education and Labor, 92d Cong., 2d Sess. (1972).

12006, while representatives of employers and insurance industry groups uniformly opposed such elimination, urging retention of some maximum in both kinds of cases. But, as one would expect, not a single witness suggested different treatment of disability cases and death cases, when urging retention or elimination of maximum limitations on weekly benefits. Nor did any member of the subcommittees that conducted the hearings do so.

Obviously, the ultimate solution was a compromise between the two extreme positions. There is, however, no basis for concluding that the form of the compromise was to retain a ceiling in disability cases while eliminating it in death cases. On the contrary, every indication is that the accommodation between conflicting points of view was to retain a maximum in all cases, but to fix it high and to allow it to rise with the national level of wages.

That idea was first suggested in the Senate Hearings in May 1972 by an industry representative and it was well received by the Chairman of the subcommittee. Hearings on S. 2318, S. 525 and S. 1547 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (Senate Hearings), 92d Cong., 2d Sess. 171-172, 174-175, 177 (1972).[11] Significantly, the proposal covered both dis-

[11] Mr. Ralph M. Hartman of the Bethlehem Steel Corporation was the spokesman:

> * * * [A] number of States have recently removed a fixed-dollar maximum and set the maximum rate at two-thirds of the State average weekly wage; two-thirds of the man's average wage, subject to a maximum of two-thirds of the State average weekly wage.
>
> We recognize the intent of the proposal, and we suggest for your consideration that the maximum weekly benefit be predicated upon the average weekly wage in the shipbuilding and ship repair industry, that it be 66 and two-thirds percent of the injured employee's average weekly wage as computed under section 10, subject to a maximum of 150 percent of the average weekly wage of the shipbuilding and ship repair industry.

Mr. Hartman made the point more fully in his written statements. Senate Hearings, *supra*, at 182-183, 196-197, 203-204, 214-216, 218.

ability and death cases. Senate Hearings, *supra*, at 203-204, 218. A like presentation was made by the same spokesman to the House Subcommittee in July, again covering both disability and death cases. Hearings on H.R. 247, H.R. 3505, H.R. 12006 and H.R. 15023 before the Select Subcommittee on Labor of the House Committee on Education and Labor (House Hearings), 92d Cong., 2d Sess. 68, 73, 74, 75, 77, 79-80 (1972). Here, we assume, was the origin of the compromise that emerged.

There was, however, one further ingredient to come. The industry representative had suggested fixing the ceiling for benefits at 150 percent of the current average wage in the shipbuilding and ship repair industry, as established from time to time by the reports of the Bureau of Labor Statistics. But he had not proposed the three-year "phase-in" of a ceiling—from $70 to 200 percent of the national average wage—that was ultimately adopted. This concept, and much else, was obviously adopted from the *Report of the National Commission on State Workmen's Compensation Laws* (*Commission Report*), issued in July 1972.

It is clear this report, commissioned by Congress,[12] had an important influence on the legislation. Its publication at the end of July, after the close of the public committee hearings, no doubt gave it a special place in the deliberations that followed. In all that concerns us, the statutory text, identical in both the Senate and House versions, was finally settled by September when the Committee Reports were issued. See S. Rep. No. 92-1125, 92d Cong., 2d Sess. 27-67, 30-31, 39-40, 41-42 (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 24-64, 28, 36-37, 38-39 (1972).[13] The critical provisions, those amending Sections 6, 9 and 10 of the Act, had been radically amended. The only intervening event was the Commission's report, and the Committee Reports make it clear that it was used as the model. See S. Rep. No. 92-1125, *supra*, at 2, 4, 5; H.R. Rep. No. 92-1441, *supra*, at 2. We accordingly turn to that report.

Although expressing some "unease" about the principle, *Commission Report*, *supra*, at 38, the report, in all its recommendations, accepts the need for an absolute ceiling on weekly benefits in all cases, including death cases. *Id.* at 19, 20, 60-62, 64-65, 71-72. The proposed maximum is tied to the average wage within

[12] See Occupational Safety and Health Act of 1970, Section 27, 84 Stat. 1616, 29 U.S.C. 676.

[13] The amended bill, as reported on September 13, 1972, was passed by the Senate the next day. 118 Cong. Rec. 30670, 30674 (1972). The House version, as reported on September 25, was passed on October 14. 118 Cong. Rec. 36376, 36389 (1972). The Senate concurred in the House version (118 Cong. Rec. 36265, 36274 (1972)) and the bill was signed into law on October 27.

the jurisdiction, to be gradually increased until it is fixed at 200 percent of the average wage. See Recommendations 3.8, 3.9, 3.15, 3.16, 3.20, 3.21, *id.* at 62, 64-65, 71-72. What is more, the identical formula is suggested for both disability and death cases. *Ibid.* As the Commissioners explained: "We believe that the arguments discussed earlier concerning the maximum weekly benefits for temporary and permanent disabilities are equally applicable for death cases * * *." *Commission Report*, *supra*, at 71. Finally, for permanent total disability and death cases—but not cases of lesser disability—the *Commission Report* recommends "that beneficiaries * * * have their benefits increased through time in the same proportion as increases in the State's average weekly wage." Recommendations 3.14, 3.22, *id.* at 64, 71.

Here, quite obviously, is the source of the "phase-in" maximum announced in Section 6(b) of the Act and of the annual adjustments in permanent total disability and death cases provided for in Section 10 (f). See S. Rep. No. 92-1125, *supra*, at 4. It would be most surprising if, having accepted so much, the Ninety-Second Congress rejected, without explanation or even mention, the *Commission Report's* conclusion that the same considerations "are equally applicable in death cases." Especially so, when the Senate Committee that drafted the final bill reported its belief "that the provisions of this bill are fully consistent with the recommendations of the National Commission [on State Workmen's Compensation Laws]." S. Rep. No. 92-1125, *supra*, at 2. The available evidence

is that the draftsmen of the 1972 amendments intended to follow the Commission in preserving a ceiling on death benefits like all others. If they meant to do otherwise, they were unusually quiet about it.

2. To be sure, it is conceivable that Congress changed the rule without flagging its action or explaining its reasons. But to indulge that assumption is made the more difficult because we cannot readily surmise what considerations would be thought to justify lifting the ceiling altogether in death cases alone.

The court below saw the difficulty and sought to overcome it (Pet. App. 11a-12a). Following the Administrative Law Judge (Pet. App. 60a-61a), the court suggested that the *Commission Report* had recognized arguments "in favor of dispensing with maximum limitations in the case of death while retaining them for disability" (Pet. App. 11a). We do not so read the passage referred to (*Commission Report*, *supra*, at 71):

> The Proportion of Lost Remuneration to be Replaced
>
> In most States, but not all, the proportion of the worker's weekly wage replaced by death benefits varies with the number of dependents. Section 18 of the Model Act provides that a surviving spouse will receive 50 percent of the weekly wage of the deceased; a widow or widower with two children under 18 receives 75 percent of the weekly wage; two orphans receive 50 percent of the deceased's weekly wage, and so on.
>
> Determination of the appropriate proportion of lost remuneration to be replaced by death benefits involves several considerations. In contrast to workers with temporary or permanent disabilities, the living expenses of the deceased no longer take a share of the family budget. This reduction in family needs suggests that the proportion of wages to be replaced should be less in death cases than in total disability cases. However, one reason why disability benefits replace less than 100 percent of wage loss is the theory that the injured worker needs an economic incentive to return to work. For the dead, there are no motivation problems, which suggests that replacement of more than the normal 66⅔ percent of lost wages is appropriate. The considerations that suggest the proportion of lost wages to be replaced in death cases should be greater than, or less than, the proportion in total disability cases seem to be roughly in balance.
>
> As in the total disability cases, wages lost by death cases are not necessarily the same as spendable income lost. A formula which relates death benefits to spendable earnings would take account of the impact of taxes and also would automatically adjust the benefit in response to the number of surviving dependents.

Very clearly, it seems to us, the Commission is not here discussing whether there ought to be any absolute maximum on weekly benefits: that is treated in the following section entitled "Maximum Weekly Benefit," with the conclusion we have already quoted. *Id.* at 71-72.[14] The portion of the Report relied upon by

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[14] The full text is as follows:

> Maximum Weekly Benefit
>
> The Model Act provides that the maximum weekly benefit in death cases shall be equal to two-thirds of the

the court of appeals is merely alluding to the arguments for and against fixing the *maximum percentage of actual wages* paid in death cases above or below the usual two-thirds. Concluding that the conflicting considerations are "roughly in balance," the Commission makes the same recommendation as for disability cases, but expressly "subject to the State's maximum weekly benefit." *Ibid.*

One cannot find anywhere in the National Commission's report any proposal for removing the ceiling on death benefits. Nor are we aware of any suggestion, from any source, that benefits for disability should be subject to a maximum, but not death benefits. Cer-

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State's average weekly wage. We believe that the arguments discussed earlier concerning the maximum weekly benefits for temporary and permanent disabilities are equally applicable for death cases, and therefore:

R3.23

We recommend that as of July 1, 1973, the maximum weekly death benefit be at least 66 2/3 percent of the State's average weekly wage, and that as of July 1, 1975, the maximum be at least 100 percent of the State's average weekly wage.

R3.24

We recommend that as of July 1, 1977, the maximum weekly death benefit be at least 133 1/3 percent of the State's average weekly wage; as of July 1, 1979, the maximum should be at least 166 2/3 percent of the State's average weekly wage, and on and after July 1, 1981, the maximum should be at least 200 percent of the State's average weekly wage.

tainly, no such scheme was urged upon the relevant congressional committees. In these circumstances, it seems to us, the Court of Appeals for the District of Columbia Circuit was justified in concluding (*Boughman, supra*, 545 F.2d at 213) that:

> Congress did not intend to provide, without ever so stating and in sharp contradistinction to every previous version of the Act, that a totally disabled employee, in need of continuing care, should be compensated less generously than the family of an employee who dies. It is hardly within the policy of this Act to place a premium on death. [Footnote omitted.]

3. As it happens, however, we need not rely on silence alone. The Committee Reports are explicit that death benefits, like compensation for permanent total disability, are subject to the ceilings announced in Section 6(b)(1). In identical passages, the S. Rep. No. 1125, *supra*, at 5 and the H.R. Rep. No. 1441, *supra*, at 3 explain:

> To the extent that employees receiving compensation for total permanment [sic] disability or survivors receiving death benefits receive less than the compensation they would receive if there were no phase-in, their compensation is to be increased as the ceiling moves to 200 percent.

There is nothing ambiguous in these statements. Plainly, Congress believed it had imposed the maximum announced in Section 6(b)(1) on death benefits: else, there was no cause to provide, with respect to "survivors," that "their compensation is to be in-

creased as the ceiling moves to 200 percent." The congressional intent is perfectly clear.

C. The Text Of The Statute

We may be sure what Congress intended. But it remains to determine whether that intention was translated into the text of the 1972 Act. We submit it was—albeit not in the most direct way.

1. *The silence of Section 9(e)*

As we have seen, Section 9(e) of the Longshoremen's Act, before 1972, provided both a floor and a ceiling on survivor benefits by the device of fixing arbitrary minimum and maximum wages ($27 and $105) that would be considered in calculating the benefit payable to dependents after the worker's death. And we know that the 1972 amendment to Section 9(e) substituted a new minimum, defined in terms of the national average wage, but no new maximum. That is the primary basis of the holding that there is now no upper limit (except the deceased's actual wages) on death benefits.

Undeniably, the most obvious place to stipulate a maximum on death benefits was in Section 9(e), where the new minimum is announced and where the old maximum was specified. We cannot adequately explain the omission. Perhaps the answer lies in the fact that the new ceiling (unlike the new minimum) was to be defined as a direct limit on *benefits* payable to the survivors, rather than the maximum wages that would be considered. Thus, the new formula

would not conveniently fit in the place of the old: one cannot insert a direct ceiling on benefits in a sentence that begins, "[i]n computing death benefits the average weekly wages of the deceased shall be considered to have been not more than * * *."

Of course, notwithstanding the resulting asymmetry, a new sentence could have been added setting forth the new ceiling. It may have been intended, and overlooked. But it cannot matter whether the new ceiling is announced in the most appropriate place, so long as we can find it somewhere in the statute. We submit the relevant provision, perhaps misplaced, is to be found in Section 6(d).

2. *Section 6(d)*

Read alone, Section 6(d) does not immediately reveal its meaning. Nothing in the provision clearly resolves whether the "determinations" spoken of are only the annual computations of the national average wage provided for in Section 6(b)(3), or also encompass the statutory "determinations" of the applicable ceilings—from 125 percent to 200 percent of the national average wage—set forth in Section 6(b)(1). Nor can we be sure, without other evidence, whether the "periods" referred to relate to the transition years of the phase-in or merely the continuing annual adjustments of the national average wage. But the otherwise obscure language of Section 6(d) takes on meaning when we look to related provisions.

One thing is clear: Section 6(d) applies to both permanent total disability benefits and death benefits, but not to cases of lesser disability. See Pet. App. 7a n. 5, 56a-57a. Yet, Section 10(f) also applies only to these same categories of beneficiaries and it increases payments annually in accordance with the determinations made under Section 6(b)(3)—whether the beneficiaries are affected by the minimum provisions, the maximum provisions, or neither. And Section 10(h) makes it clear that, in the same cases, beneficiaries of awards made before the new amendment shall be entitled to adjustments and, thereafter, will also receive the annual increases.[15] This leaves

[15] Section 10(h), 33 U.S.C. (Supp. V) 910(h), added by Section 11 of the 1972 amendments, reads as follows:

> (1) Not later than ninety days after the date of enactment of this subsection, the compensation to which an employee or his survivor is entitled due to total permanent disability or death which commenced or occurred prior to enactment of this subsection shall be adjusted. The amount of such adjustment shall be determined in accordance with regulations of the Secretary by designating as the employee's average weekly wage the applicable national average weekly wage determined under section 6(b) and (A) computing the compensation to which such employee or survivor would be entitled if the disabling injury or death had occurred on the day following such enactment date and (B) subtracting therefrom the compensation to which such employee or survivor was entitled on such enactment date; except that no such employee or survivor shall receive total compensation amounting to less than that to which he was entitled on such enactment date. Notwithstanding the foregoing sentence, where such an employee or his survivor was awarded compensation as the result of death or permanent total disability

no work for Section 6(d) if it means no more than that the permanently disabled and the survivors of deceased workers shall enjoy the annual increases computed under Section 6(b)(3). So read, the provision is mere surplusage.

There is another consideration. If Section 6(d) refers only to the increment in the national average wage, it holds down to the ceiling applicable at the date of injury all those who became permanently and totally disabled before October 1, 1975. Thus, a high wage earner injured in early 1973, suffering permanent total disability, could never receive more than

> at less than the maximum rate that was provided in this Act at the time of the injury which resulted in the death or disability, then his average weekly wage shall be determined by increasing his average weekly wage at the time of such injury by the percentage which the applicable national average weekly wage has increased between the year in which the injury occurred and the first day of the first month following the enactment of this section. Where such injury occurred prior to 1947, the Secretary shall determine, on the basis of such economic data as he deems relevant, the amount by which the employee's average weekly wage shall be increased for the pre-1947 period.
>
> (2) Fifty per centum of any additional compensation or death benefit paid as a result of the adjustment required by paragraphs (1) and (3) of this subsection shall be paid out of the special fund established under section 44 of this Act, and 50 per centum shall be paid from appropriations.
>
> (3) For the purposes of subsections (f) and (g) an injury which resulted in permanent total disability or death which occurred prior to the date of enactment of this subsection shall be considered to have occurred on the day following such enactment date.

125 percent of the then national average wage—even though today the ceiling has been raised to 200 percent and the average wage has substantially increased. See n. 3, *supra*. That result would be inconsistent with the general scheme of the Act and contrary to every indication of the legislative history. Yet, no other provision of the Act gives him the benefit of the phase-in, if Section 6(d) does not. The only solution, therefore, is to read Section 6(d) as reaching the phase-in provisions of Section 6(b)(1). And, of course, once we do that for cases of permanent total disability, we must construe the provision in the same way for death cases. The consequence is that the ceilings there announced "apply to * * * survivors * * * receiving * * * death benefits."

The road may be tortuous. But, at the end, the statute says what Congress plainly intended.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the case should be remanded for modification of the award of compensation by the imposition of the limitations of Section 6(b)(1), in the manner provided by Section 6(d), of the Longshoremen's Act.

Respectfully submitted.

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